82-1909

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SCOOBA MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the Board properly concluded that an employer violates Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by discharging an employee expressly because the employee said that she would like to have a union at the plant.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SCOOBA MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-5a) is reported at 694 F.2d 82. The decision and order of the National Labor Relations Board (App. C, *infra*, 7a-27a) are reported at 258 N.L.R.B. 147.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1982. A petition for rehearing was denied on January 26, 1983 (App. B, *infra*, 6a). On

April 14, 1983, Justice White extended the time for filing a petition for a writ of certiorari to and including May 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

STATEMENT

1. Respondent is a manufacturer of industrial work gloves with its office and plants in Shuqualak, Mississippi (App. C, *infra*, 10a). Lucille Willie was employed as a sewer at one of respondent's plants (*id.* at 11a). On May 22, 1980, Willie's son, also an em-

ployee at the plant, informed her that he had been discharged (*ibid.*). Willie then developed a headache and went to get some aspirin from the office of respondent's Vice President George Welch, who was in charge of operations at the plant (*ibid.*).

While Willie was in the office, Welch initiated a discussion about Willie's son's discharge (App. C, *infra*, 11a). The conversation became heated and turned to Willie's employment record, specifically her production output and absenteeism. Welch obtained Willie's records and confronted her with them (*id.* at 18a). Willie then started to leave Welch's office, but before she did, she turned back to Welch and said (*id.* at 12a): "It would be nice if it was a union here. A whole lot of things going on wouldn't be going on." Willie then went to the restroom to take her aspirin.

Welch sent someone after Willie to get her to come back to his office. When she returned, Welch told her (App. C, *infra*, 12a): "You just fired your damn self. Don't nobody threaten me with no damn union because this is my plant, and I run it any damn way I want." Willie then retrieved her personal belongings, was given a final paycheck and left the plant permanently.[1]

2. On May 29, 1980, Willie filed an unfair labor practice charge with the National Labor Relations Board (App. C, *infra*, 9a). Upholding the decision of the administrative law judge ("ALJ"), the Board concluded that respondent had violated Section 8(a)(3)

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[1] While they were waiting for the paycheck, Welch told Willie to return the following Monday, with her husband, to talk the situation over. Willie did not, however, return (App. C, *infra*, 12a). The Board rejected respondent's contention that because of this remark Willie was merely laid off and not discharged (*id.* at 20a-21a).

and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by discharging Willie because of her prounion remark and separately violated Section 8(a)(1) of the Act by stating expressly that her prounion comment was the reason for her discharge (App. C, *infra*, 7a-8a, 21a). The ALJ found that Willie was discharged because respondent "viewed her remarks as a threat to initiate union organizational efforts" (*id.* at 21a). The ALJ rejected respondent's claim that the reason for the dismissal was her employment record; he found that the nature of Welch's remark and the timing of the decision to fire —immediately after Willie's union remark—were pursuasive evidence that the prounion statement was the reason for respondent's action (*id.* at 19a-20a). The ALJ found that the discharge violated the Act because "[s]uch action obviously discouraged Willie or any other employee from seeking union membership or otherwise engaging in activity in support of any labor organization, actions protected under the Act" (*id.* at 21a).

In addition, the ALJ found that Vice President "Welch's statement to Willie that she had fired herself because of the threatened resort to a union independently violated Section 8(a)(1) [of the Act,]" because it "constitute[d] an unquestionable threat to all other employees that any inclination toward union activity on their part would result in similar discrimination against them" (App. C, *infra*, 21a-22a). Accordingly, the Board ordered respondent to cease and desist threatening or discharging employees for union activities and ordered Willie reinstated with back pay (App. C, *infra*, 23a-24a).

3. The court of appeals denied enforcement of the Board's order (App. A, *infra*, 1a-5a). The court held

that Willie was not engaged in activity protected by Section 7 of the Act, 29 U.S.C. 157, when she expressed support for having a union (App. A, *infra*, 5a). The court found no indication that by making this comment Willie "was seeking to instigate some form of group action," which the court concluded was necessary to convert single employee speech into "concerted activity" within the meaning of Section 7 (App. A, *infra*, 3a). Instead, the court concluded that Willie was merely engaged in "a purely personal dispute with Welch" and thus, regardless of respondent's reason for firing her, Willie's discharge was not violative of the Act (*id.* at 4a).[2]

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals, holding that a single employee's prounion statement was not protected activity under Section 7 of the Act, rests on reasoning akin to that adopted by the Sixth Circuit in *City Disposal Systems, Inc.* v. *NLRB*, 683 F.2d 1005 (1982), in holding that a single employee's assertion of a contractual right not to drive an unsafe truck was not protected by Section 7. This Court granted the Board's petition for a writ of certiorari in *City Disposal Systems, Inc.* (No. 82-960) on March 28, 1983, and it is likely that the decision in that case will have a bearing on the validity of the Fifth Circuit's decision here. Accordingly, the court may wish to hold this petition, pending final disposition of *City Disposal Systems, Inc.*

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[2] Although the issue was briefed by both sides, the court of appeals made no mention of the Board's finding of a separate violation of Section 8(a)(1) based on Welch's antiunion statement made at the time of the firing, which the Board found would tend to deter other employees from initiating Section 7 activities.

Alternatively, the decision of the court of appeals that an employer may lawfully discharge an employee for expressing prounion sentiments to a member of management constitutes a serious misapplication of established principles for determining what constitutes discrimination proscribed under Section 8(a)(3) and (1) of the National Labor Relations Act, and is inconsistent with a decision of the First Circuit. Thus, as an alternative to holding this petition pending its decision in *City Disposal Systems, Inc.*, the Court should grant the petition in order to consider the additional issues presented in this case.

1. Both the Fifth Circuit in this case and the Sixth Circuit in *City Disposal Systems, Inc.* v. *NLRB*, *supra*, concluded that the crucial element necessary to convert single employee action into "concerted" activity is the intention of the individual employee to be acting on behalf of others or to be preparing others for group activity. Compare App. A, *infra*, 4a, with *City Disposal Systems, Inc.* v. *NLRB*, *supra*, 683 F.2d at 1007-1008. In both cases, the courts of appeals searched in vain for evidence indicating that the individual involved was acting or expected to act on behalf of others.

What both decisions ignore is that the Board, relying on its expertise in these matters, has concluded that certain conduct undertaken by a single individual inherently affects all other employees and thus is within the coverage of Section 7.[3] Accordingly, the Board

[3] Indeed, the need for collective representation to aid individual employees in pursuing their individual concerns was the impetus for enacting the National Labor Relations Act. "[A] single employee was helpless in dealing with an employer; * * * union was essential to give laborers opportunity to deal on an equality with their employer." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). "To that end

argued, *inter alia*, in its petition in *City Disposal Systems, Inc.* (82-960 Pet. 11), that an employee who successfully asserts a right in a collective bargaining agreement necessarily benefits all members of the unit subject to that agreement. Hence, regardless of the specific employee's motive or personal interest in the outcome, the action is still concerted activity. See *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975); *Anchortank, Inc.* v. *NLRB*, 618 F.2d 1153, 1161 (5th Cir. 1980). Similarly, any prounion statement made in the course of an employee-management discussion of alleged arbitrary employment practices sufficiently anticipates possible future union activity to be protected by Section 7.[4] If the Board's position in *City Disposal Systems, Inc.* is sustained by this Court, the Fifth Circuit's requirement of specific evidence of "concertedness" in the present case would necessarily be undermined. Accordingly, the Court may wish to hold this petition pending its decision in *City Disposal Systems, Inc.*

2. The Board submits alternatively that the court of appeals' interpretation of Section 8(a)(3) is independently worthy of review by this Court. Section

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the Act is designed to eliminate the 'inequality of bargaining power between employees * * * and employers.'" *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 262 (1975), quoting Section 1 of the Act, 29 U.S.C. 151. When individual employees seek to invoke the protections of collective action on behalf of their personal concerns, they act to enforce the rights the statute was designed to secure.

[4] Section 7 gives employees the right, *inter alia*, "to form, join, or assist labor organizations." The Board's determination that nascent union activity is protected reflects the fact that it is not at all uncommon for organizational efforts to spring up from a single instance of employee dissatisfaction. See Blum, *Why Unions Grow?* 1968 Labor History 39, 64.

8(a)(3) of the Act prohibits discrimination in employment to encourage or discourage union membership, activity or support. *Associated Press* v. *NLRB*, 301 U.S. 103, 129 (1937); *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 39-40 (1954). Respondent's discharge of Willie for "threaten[ing respondent] with [a] damn union" (App. C, *infra*, 12a) constitutes unlawfully motivated, antiunion discrimination in its most elemental and obvious form. Willie lost her employment solely because she expressed a desire for a union at her plant, and, what is worse, the obvious purpose of the discrimination against her was to discourage such union activity from ever starting. It is difficult to imagine a more pernicious employment practice than to discharge any employee who expresses the slightest interest in a union.[5]

Indeed, the other courts of appeals that have dealt with the precise question of whether a discharge for making prounion statements violated Section 8(a)(3) have held that it clearly does. In *Randolph Division, Ethan Allen, Inc.* v. *NLRB*, 513 F.2d 706 (1st Cir. 1975), an employee was discharged for expressing concern about the absence of a union in the plant to a member of management. In upholding the Board's

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[5] The court attempted to support its holding by characterizing the Board's decision as allowing an employee to convert all discussions with management into "protected activity" by using the word "union" at some point in the conversation. But this grossly mischaracterizes the Board's decision. What the Board's decison proscribes is an employer discharging an employee *because* he referred to a union. If the employer has an otherwise legitimate reason for discharging an employee, the employee's job is not protected simply because he mentions a union. The ALJ in this case expressly found that respondent failed to show a business justification for the discharge.

finding of a Section 8(a)(3) and (1) violation, the court stated (513 F.2d at 708):

> We are aware of no authority supporting the proposition that the Act does not protect employees' expression of prounion sentiments, and we would in any case refuse to adopt a reading so at variance with the statutory language. The section 7 rights protected by 8(a)(1) include the right to "form" as well as "join" a labor organization and 8(a)(3) proscribes discriminatory action to "discourage membership in any labor organization." If an employer were free to fire any employee who showed a specific interest in the unionization of its employees, it could effectively forestall the exercise of section 7 rights by excluding from the work force all who showed any interest in exercising them. If it could so extinguish seeds, it would have no need to uproot sprouts. The policy of the National Labor Relations Act is "to insulate employees' jobs from their organizational rights," *Radio Officers' Union, supra*, 347 U.S. at 40, * * * and the prohibitions contained in sections 8(a)(1) and (3) are too broadly stated for us to conclude that an employer may, even in the absence of an organizing drive, discharge employees who express prounion attitudes.

Similarly, the Ninth Circuit in *Signal Oil & Gas Co.* v. *NLRB*, 390 F.2d 338 (1968), upheld the Board's finding that an employer had violated Section 8(a)(3) and (1) of the Act by discharging one unrepresented employee for stating to another unrepresented employee that he hoped the employer's organized employees would strike. The court stated (390 F.2d at 343): "[I]t can hardly be doubted that * * * discharge of an employee because he makes a pro-union or pro-strike statement would tend within the meaning of

the Act to 'discourage membership in [a] labor organization * * *.'"

The Fifth Circuit reached its conclusion that there was no violation of Section 8(a)(3) by holding implicitly that antiunion discrimination is an unfair labor practice only when it is directed at employees who have engaged in protected, concerted activity under the Act. But, as noted, *supra*, pages 7-8, Section 8(a)(3) prohibits any discrimination in employment to discourage union membership, activity or support.[6] Thus, while discrimination on the basis of protected activity may be sufficient for a Section 8(a)(3) violation (see *Metropolitan Edison Co.* v. *NLRB*, No. 81-1664 (Apr. 4, 1983), slip op. 9), a discharge for antiunion reasons will discourage union activity even though the person discriminated against has not ac-

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[6] It has consistently been held that to threaten an individual employee with discharge for engaging in union or other activity protected by Section 7 of the Act is violative of Section 8(a)(1), even though there is no showing that the employee was actually engaged in such activity. As the court stated in *NLRB* v. *Coca-Cola Co. Foods Division*, 670 F.2d 84, 86 (7th Cir. 1982), in finding that the employer violated Section 8(a)(1) by threatening to retaliate against an employee if he discussed his grievance with other employees:

> It would be absurd to conclude that if long before there were any stirrings of union activity at a plant the management threatened to shoot anyone who joined a union, section 8(a)(1) would not be violated because no one could prove that concerted activity protected by section 7 would ever have taken place in the absence of the threat. A right can be denied before its exercise is attempted or even contemplated.

If a threat to discharge an employee for engaging in Section 7 activity is thus violative of the Act without a showing that such activity is occurring, *a fortiori*, it should be violative of the Act to discharge an employee for expressing a desire to engage in such activity.

tually engaged in protected activity. Accordingly, an employer violates Section 8(a)(3) by discriminating against employees because of a mistaken belief that they are union activists or sympathizers,[7] or by discriminating against a group that includes neutral and antiunion employees where the reason for the discrimination is union activity generally.[8]

The decision of the court of appeals in this case is thus inconsistent with other courts of appeals' decisions interpreting Section 8(a)(3). Moreover, if followed in other cases, the decision below would seriously undermine the protection against discrimination which Section 8(a)(3) and (1) was intended to afford employees who exercise their Section 7 right to form, join, or support a union. An employer could with impunity nip a union campaign in the bud merely by discharging employees, one at a time, as soon as they voiced prounion sentiments.[9] Clearly such a result is at odds with the fundamental purpose of Section 7 of the National Labor Relations Act.

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[7] See, *e.g.*, *NLRB* v. *Link-Belt Co.*, 311 U.S. 584, 589-590 (1941); *Henning & Cheadle, Inc.* v. *NLRB*, 522 F.2d 1050, 1052 (7th Cir. 1975); *NLRB* v. *Clinton Packing Co.*, 468 F.2d 953, 955 (8th Cir. 1972).

[8] See, *e.g.*, *NLRB* v. *Rich's Precision Foundry, Inc.*, 667 F.2d 613, 628 (7th Cir. 1981); *M.S.P. Industries, Inc.* v. *NLRB*, 568 F.2d 166, 176 (10th Cir. 1977); *NLRB* v. *Tesoro Petroleum Corp.*, 431 F.2d 95, 97 (9th Cir. 1970).

[9] The difficulty created by the court of appeals' requirement that the General Counsel must supply proof that "collective worker action is contemplated" (App. A, *infra*, 5a) by the individual employee is that the employer by discharging the employee may eliminate and certainly will diminish the incentive or ability of the dismissed employee to pursue further organizational activities with that employer. Thus, the employer by his own misdeed may be able to eliminate the only evidence that would satisfy the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted or, alternatively, it should be held pending the Court's disposition of *NLRB* v. *City Disposal Systems, Inc.*, No. 82-960, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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MAY 1983

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 81-4411
Summary Calendar

SCOOBA MANUFACTURING COMPANY,
PETITIONER CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT CROSS-PETITIONER

Dec. 20, 1982

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Scooba Manufacturing Company produces work gloves at its plant in Shuqualak, Mississippi. Scooba employed Lucille Willie as a sewer at that plant. George Welch was the vice-president of operations un-

til 1980. After a heated argument between Willie and Welch, Willie was discharged. The General Counsel of the National Labor Relations Board alleged that Scooba had violated sections 8(a)(1) and (3) of the National Labor Relations Act by discharging Willie. An administrative law judge found that Scooba had violated the act, and the Board adopted the ALJ's recommended order. Scooba filed a petition for review before this court, and the Board cross-petitioned for enforcement of its order. Because we conclude that Willie was not engaged in activity protected by the NLRA, we set aside the Board's order, grant the petition for review, and deny the petition for enforcement.

Willie was working at her station one day when she learned that Scooba had fired a fellow employee who also happened to be her son. The trauma of the moment brought on a headache, and she left her station to get some aspirin from Welch's office. A vigorous argument ensued between Willie and Welch regarding her son's discharge. The escalating argument gradually turned to Willie's own work performance and absenteeism. To substantiate his arguments, Welch ordered a plant supervisor to retrieve Willie's production records. When the supervisor returned, Willie started to leave the room. As she reached the doorway, she turned to Welch and angrily proclaimed: "It would be nice if it was a union here. A whole lot of things going on wouldn't be going on." With that, she stormed out.

Desiring to have the last word, Welch summoned Willie. When she returned, he vociferated: "You just fired your damn self. Don't nobody threaten me with no damn union because this is my plant, and I run it any damn way I want." He sent the supervisor to ob-

tain Willie's time records. Willie was given her final paycheck and sent home. Before leaving, Welch told Willie to return the following Monday with her husband to talk about the situation. Willie never returned.

Willie testified that she never engaged in any union activity. No labor organization represented the Scooba workforce. There had never been a union-organizing campaign at the Scooba plant.

Section 7 of the NLRA, 29 U.S.C. § 157, guarantees employees the right to form, join and assist labor organizations, "and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection . . . ." Scooba has been accused of improperly interfering with those rights.

The mere fact that an employee acts alone does not preclude treatment of his action as a protected activity under the Act. *Richardson Paint* v. *NLRB*, 574 F.2d 1195, 1207 (5th Cir. 1978). That individual employee, however, must be engaging in the activity with the object of initiating, inducing or preparing for group action. It is essential that the activity have some relation to group action in the interest of the employees. *NLRB* v. *McCauley*, 657 F.2d 685, 688 (5th Cir. 1981); *Anchortank, Inc.* v. *NLRB*, 618 F.2d 1153, 1161 (5th Cir. 1980); *NLRB* v. *Buddies Supermarkets, Inc.*, 481 F.2d 714, 717-19 (5th Cir. 1973); *Southwest Latex Corp.* v. *NLRB*, 426 F.2d 50, 56 n.3 (5th Cir. 1970). Absent substantial evidence that the discharged employee was seeking to instigate some form of group action, dialogue with management is not a protected activity. *NLRB* v. *Datapoint Corp.*, 642 F.2d 123, 128 (5th Cir. 1981); *Buddies Supermarkets, Inc.*, 481 F.2d at 718; *Mushroom Transportation Co.* v. *NLRB*, 330 F.2d 683, 685 (3d Cir.

1964). *See McCauley*, 657 F.2d at 688 ("Individual griping and complaining are not protected concerted activity.")

We have searched the record in vain for evidence that Willie's exchange with Welch was "talk looking toward group action." *Buddies Supermarkets* at 718. There is no indication that Willie was acting as a spokeswoman for her fellow employees. The record shows no prior effort at organization by any other employee or group, nor does it show any prior talk about collective bargaining by any employees. Willie's remark was the product of a purely personal dispute with Welch.

The Board argues that we are bound by *NLRB* v. *McCauley*, 657 F.2d 685 (5th Cir. 1981). That case is easily distinguishable from this one. In *McCauley*, an employee named Richard Beck talked with at least two of his fellow employees concerning their working conditions and the possibility of unionization. Beck then met with several management officials. He made numerous complaints, and continually emphasized that he was acting on behalf of all employees. One of the supervisors forbade him from discussing the issues with other workers. Beck answered that the company "left him no alternative except to contact the local union representative to come in and try to bargain." *Id.* at 687. Beck was discharged on the spot. We held that Beck's actions "were clearly a predicate for possible group activity." *Id.*

Unlike the employee in *McCauley*, Willie never discussed the possibility of unionization with other Scooba employees. She did not purport to act on behalf of other workers. She did not threaten to contact a union, but merely stated that she thought one would be "nice." It is obvious that *McCauley* involved an

entirely different situation from that involved in this case.

In effect, the Board urges that if any employee uses the word "union" in a conversation with his superiors he or she is automatically engaged in protected concerted activity. We do not agree. Purly personal disputes are not within the protection of the Act. The General Counsel must show that some sort of collective worker action is contemplated. That was not done here. We therefore set aside its order. Scooba's petition for review is GRANTED. The Board's cross-petition for enforcement is DENIED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4411

SCOOBA MANUFACTURING COMPANY,
PETITIONER CROSS-RESPONDENT,

versus

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT CROSS-PETITIONER

Petition for Review and Cross-Application for
Enforcement of an Order of the
National Labor Relations Board

ON PETITION FOR REHEARING
(January 26, 1983)

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Charles Clark
Chief Judge

Clerk's Note:

See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate.

APPENDIX C

FJZ

258 NLRB No. 38

D—8013
Shugualak, MS

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 26—CA—8457

SCOOBA MANUFACTURING COMPANY

and

LUCILLE WILLIE, AN INDIVIDUAL

DECISION AND ORDER

On May 26, 1981, Administrative Law Judge Hutton S. Brandon issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's

conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Scooba Manufacturing Company, Shuqualak, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. September 22, 1981

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

DON A. ZIMMERMAN, Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

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resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

JD—(ATL)—45—81
Shuqualak, MS

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
ATLANTA, GEORGIA

Case 26-CA-8457

SCOOBA MANUFACTURING COMPANY

and

LUCILLE WILLIE, AN INDIVIDUAL

Beatrice Chan Hubbard, Esq., for the General Counsel

Armin J. Moeller, Jr., Esq. (Fuselier, Ott, McKee & Moeller), of Jackson, MS, for the Respondent

Ms. Lucille Willie, *Pro Se.*

DECISION

HUTTON S. BRANDON, Administrative Law Judge: This case was tried at Macon, Mississippi, on March 30, 1981. The charge was filed by Lucille Willie, an individual, herein called Willie, on May 29, 1980.[1] and amended on June 24. Complaint on the charge issued on July 1 alleging that Scooba Manu-

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[1] All dates are in 1980 unless otherwise stated.

facturing Company, herein called the Respondent or the Company, violated Sections 8(a)(3) and (1) of the National Labor Relations Act, herein called the Act, by discharging its employee, Willie, on May 22. The complaint further alleged that the Respondent independently violated Section 8(a)(1) of the Act by threatening an employee with discharge because of the employee's expressed support of a labor organization.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent is a corporation with an office and plants located in Shuqualak, Mississippi, where it is engaged in the manufacture of industrial gloves. The Respondent annually purchases and receives at its Shuqualak facilities, products, goods, and materials valued in excess of $50,000 directly from points outside the State of Mississippi. The complaint alleges, the Respondent admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Alleged Unfair Labor Practices

The instant case grows out of events and conversations that took place on May 22 at one of the Respondent's Shuqualak plants and culminated in the separation from the Respondent of employee Willie. The conversations or discussions were between Willie and the Respondent's then vice president George

Welch,[2] and various portions of the conversations were observed by stock girl Virginia McBride, floor supervisor Virgie Thomas and plant manager Kenny White. All testified herein. Willie and McBride testified for the General Counsel. Willie had worked as a sewer on a closing operation and had been employed by the Respondent or its predecessor since the early seventies.[3] Willie also had a son, William Dinsmore, who she had prevailed upon the Respondent to hire. Dinsmore had some difficulties during his approximately 10 months of employment and was accused of making several costly errors for the Respondent. Willie testified that on May 22 Dinsmore reported to her as he went by her work station that he had been fired and was leaving. Shortly after receipt of this information Willie suffered a headache and went to Welch's office which was near her machine for the purpose of getting aspirin. Welch was in the office with White. As she was getting the aspirin Welch, according to Willie, remarked that he had to let Dinsmore go and Willie replied that it was alright if he had a reason. Welch responded that Willie could go too, but she answered that she didn't have a reason to go. Thereafter, Welch explained that Dinsmore had cost Welch over $500 every week. Willie challenged Welch's remark saying that there was no way the Respondent would have someone

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[2] Subsequent to May 22 and prior to the hearing herein Welch retired.

[3] Willie had experienced one break in her early employment when it was discovered that she had falsified her production records. She had admittedly falsified her records due to her embarassment in not being able to keep up with more experienced operators.

costing the Respondent over $500 a week for over ten months. Willie then left but stopped to lean back in the office door and remarked, "It would be nice if it was a union here." "A whole lot of things going on wouldn't be going on." Welch did not respond and Willie proceeded to the rest room to take her aspirin.

Willie testified that after she came out of the rest room she saw McBride and Welch. McBride apparently was looking for Willie, and upon seeing her pointed her out to Welch who was behind McBride. Welch then directed Willie back into his office where he pointed his finger at her and told her, still according to Willie, "You just fired your damn self. Don't nobody threaten me with no damn union because this is my plant, and I run it any damn way I want." Welch added, "Do you realize I could have done fired you?" Willie asked why and Welch stated, "Because of the menders[4] that you make." Willie protested that if he fired her for menders he would have to fire everybody. Thereafter Welch phoned Judy Higginbotham, a payroll clerk for the Respondent in Macon, Mississippi, a few miles away to have Willie's check prepared along with Dinsmore's check. Welch then told Willie to go home and cool off and bring her husband back with her the following Monday to talk the situation over. While waiting for the checks to be delivered to the plant Willie was allowed by Welch to get her personal things at her work station with Welch watching her. Willie returned to Welch's office where she and Welch engaged in general conversation until the checks were delivered, after which she left the plant and did not return.

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[4] A mender is a glove having defects due to sewing errors which must be corrected before it can be sold.

Willie identified White as being present in the office with Welch during the initial conversation. Further, she placed McBride in the office as Willie was leaving and related that McBride "couldn't help" but hear Willie's remark about the Union. Willie could not recall Thomas being present in the office but did recall Welch sending White after Thomas to check on Willie's production to back up Welch's claim that he had had to pay Willie "make up pay" ever since she had been employed. Although Willie admittedly used the word "hell" at one point in her initial conversation with Welch she denied that she had directed any profanity at him or used any vulgarities in talking to him. Willie acknowledged that the fact that her son "being let go" angered her but claimed her anger was directed at her son and not Welch.

Portions of Willie's testimony were corroborated by McBride. McBride related she had seen Willie go into Welch's office on May 22. McBride testified, however, that Willie had actually left the office and at that point in time McBride entered the office to get some production tickets. McBride could recall no one else being in the office other than Welch. Within a few seconds Willie returned to the door and told Welch, according to McBride, that she would have the Union in Monday morning. Welch did not respond. McBride left the office, but shortly thereafter Welch came to McBride and asked her to go to the rest room to see if Willie was there. As McBride was proceeding to the rest room Willie came out and went back into the office with Welch. McBride testified that she did not know whether Willie had been fired prior to her remark to Welch about a union. However, she did testify that Thomas was out "pull-

ing" Willie's production sheets prior to the time McBride overheard Willie's union reference to Welch.[5]

The Respondent's version of the facts was related through Welch, Thomas, and White. In Welch's version Willie came into his office for the aspirin, got them, and left. She came in a second time and at that point Welch started a conversation with her regarding Dinsmore. Willie became angry and was loudly raving. Welch testified that Willie "was bad to say 'piss' " and she said "damn" on a lot of occasions in the conversation, but he was not able to relate exactly how she had used such words. He generally testified that he regarded Willie as insubordinate in her conversation with him and decided to give her her "time." He sent Thomas to obtain Willie's time and then sent to Macon for her check. Willie waited in his office while the check was being delivered and they discussed various subjects. He sent her home telling her to come in the next Monday with her husband and they would talk the situation over. According to Welch, Willie told him at one point that she was going to send a union in and OSHA[6] also. However, Welch related that he had already sent after Willie's "time" at the time she made the statement regarding a union. Welch signed a personnel form on Willie on May 22 showing that she was "laid off" for "Insubordination to her boss (Mr.

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[5] It is not clear whether McBride was referring to past production sheets showing the extent of "menders" by Willie or to production records necessary to establish the pay due Willie. In view of White's testimony discussed *infra* I conclude it was the former.

[6] This was an apparent reference to the Occupational Health and Safety Act. Willie in her testimony denied any reference to OSHA and said she didn't even know what it meant.

Welch)." [7] A similar form was made out on May 28 pursuant to Welch's instruction changing Willie's layoff status to a termination after Willie did not come in on Monday, May 26, with her husband as requested by Welch.[8]

Plant Manager White was present during much of the encounter between Welch and Willie. In his version when Willie entered Welch's office for some medicine a discussion was initiated by Welch about Dinsmore. With respect to Willie's language White recalled that at one point Willie told Welch, "Piss, you know better than that," and the word "piss" was repeated several times by Willie. Willie's absenteeism and her mender rate came up, and Willie denied Welch's allegations regarding her deficiencies in these areas. Thomas was called and sent to get Willie's records. Thereafter, White left Welch's office and went into an adjacent office to make some telephone calls. He testified that he believed while he was out Willie went to the rest room. After he returned to the room Welch announced the decision to separate Willie and it was at this point that Welch asked to have Willie's "time" ascertained. White testified he did not hear any references to a union by Willie at any time he was present in Welch's office.

Thomas initially testified that she was called to Welch's office and told to get Willie's "time" for payroll. She did so and when she returned to the office with the information she heard Willie make a statement that she could bring a union in there. She testified she heard no response from Welch to Willie's remark and added that no one else was in the office

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[7] G.C. Exh. 2.

[8] Resp. Exh. 4.

at the time. On cross examination Thomas related that she had also gone after some mender records for Welch. She then expressed uncertainty whether she had gotten the mender records before she got Willie's "time" information. Then she testified that she got both the time records and the mender records at the same time, but finally asserted she got the time records first.

Based upon Willie's testimony as corroborated by McBride the General Counsel contends that Welch fired Willie because she threatened to bring a union in. The Respondent's position is that there was no Company policy in existence relative to opposition to unions,[9] that Willie had not been engaged in protected concerted activity under the Act when she referred to bringing a union in, that she was laid off before she mentioned a union, that there was no showing that she was treated any different from any other employee who was insubordinate, and that she was only terminated after she failed to return the following Monday to talk the situation over with Welch.[10]

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[9] Both Fred Stege, the Respondent's other vice president and general manager, and Nathaniel Starks, Respondent's president, testified for the Respondent that no Company policy regarding unions had been formulated or even discussed. There is no dispute that there was no union campaign going on at the time of Willie's separation. Moreover, it appears from all the testimony that there had never been a union organizational campaign at the Respondent's plants in the past.

[10] The Respondent argues also that in a Mississippi Employment Security Commission decision involving Willie's entitlement to unemployment compensation it was determined that Willie had used loud and abusive language to Welch. While not binding on the Board the decisions of state employ-

B. *Conclusion*

Obviously resolution of this case is dependent upon who is to be believed regarding what happened in Welch's office on May 22. From a demeanor standpoint I found Willie to be candid, sincere, and generally straightforward. In short, and although I am not convinced that her recollections were accurate in all respects, based upon demeanor I found her credible. I likewise found McBride to be credible in demeanor. She too was earnest in her appearance as well as sincere. Moreover, McBride's testimony was all the more credible because she was an employee of the Respondent at the time of the hearing and may be considered as testifying adversely to her pecuniary interest. *Golden Standard Enterprises, Inc., et al.*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 (1961), modified 308 F.2d 89, 91 (5th Cir., 1962). On the other hand, I found Welch evasive and indirect, and at times, unresponsive. He was unable or unwilling to attribute specific comments to Willie containing the alleged offensive vulgarities.

Thomas also was not an impressive witness. Her vacillation on the time or times she left Welch's office

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ment security agencies have probative value. *Duquesne Electric and Manufacturing Company*, 212 NLRB 142 (1974). They are not controlling, however. *Supreme Dying and Finishing Corp. and Valley Maid Co.*, 147 NLRB 1094, 1095 (1964). Here I have given little weight to the State commission's finding on Willie's termination since it is unclear that the commission considered all the unfair labor practice evidence considered herein in reaching its decision that Willie had engaged in "misconduct" warranting the denial of benefits. It appears that neither McBride or Thomas testified before the State commission.

to get production information or payroll information on Willie considered in the context of her hesitant manner while testifying, I conclude, renders her incredible.

White also indicated some confusion about whether Thomas was sent to get Willie's time during the first or second time White was in Welch's office, finally testifying that it was the second time. White also equivocated about whether Willie requested or was directed to go to her work station to pick up her personal belongings. Moreover, White was vague at times regarding specific remarks of Willie in the conversation with Welch.

Considering all the foregoing, I am persuaded that the testimony of Willie as largely corroborated by McBride is the most plausible and believable although there may be certain elements of truth in the assertions of Welch and particularly White. It is my conclusion on the record considered as a whole and particularly the testimony of Willie and McBride, that Willie did go into Welch's office to get aspirin; that while she was there she was engaged in a conversation with Welch regarding her son's separation from the Respondent; that a vigorous if not heated discussion followed; that the discussion turned to Willie's own production and absenteeism; that to substantiate contentions regarding Willie's production and absenteeism Thomas was called and directed to secure the records; that Thomas went out and got the records and returned with them; that following confrontation with the records Willie exited Welch's office after White had already left; that upon exiting or shortly thereafter Willie returned to the doorway and, piqued by the preceding discussion, made the remark to Welch about a union; that Willie then proceeded to

the rest room; that Welch, feeling threatened by Willie's union reference, sent McBride after her to have her return to his office, that Willie returned and Welch did thereupon discharge her making the remarks attributed to him by Willie, that Welch then sent Thomas to obtain Willie's "time," and that Willie was given her pay check and sent home.

The foregoing scenario is substantiated not only by the credited testimony of Willie and McBride but also by portions of the testimony of White as well as certain other factors. Thus, White admitted that Willie's "time" was not sent for until after he had returned to Welch's office. Since he did not hear any reference to the union by Willie, and since all the other witnesses testified that Willie made such a reference it must have been made during the time White was out of Welch's office and before her "time" was sent for.[11]

It is undisputed that after her separation Willie was allowed to return to her work station to get her personal effects only under the watchful eye of Welch and with the admonition not to talk to anyone. There was no such restriction put on her when she left Welch's office earlier to go to the rest room. Thus, it would appear that Willie's departure from Welch's office to go to the rest room marked the initial termination of her discussion or encounter with Welch. Certainly there was no evidence of any direction from Welch made prior to her leaving the office for her to

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[11] Although Willie testified that White heard her remark about the Union I conclude she was in error in this regard. Such error may be based on the fact that White, while making phone calls in an adjacent office, was close enough to hear Willie's union reference but did not do so because his attention was diverted to the telephone calls.

return. Accordingly, only a remark of Willie upon leaving could explain a necessity for her recall to the office by Welch. I conclude that it was Willie's reference to a union when leaving the office which prompted the recall, and I further conclude that when she reentered the office Welch made the remarks attributed to him. This conclusion is also buttressed by the fact that any vulgarity and any insubordination in connection therewith was attributed to Willie by White during the first occasion she was in discussion with Welch in his office. Yet she was not discharged at that point. Obviously, something else happened to cause Willie to be called back to the office and to be discharged. In the sequence of the events, that "something else" could only have been Willie's reference to the need for a union.

Considering all the foregoing I conclude that the General Counsel established a *prima facie* case, that Willie was discharged because of her reference to a union which Welch considered to be a threat since, in the words attributed to Welch by Willie, it was "his damn plant and I run it any damn way I want." The absence of any Company policy against unions does not preclude the existence of personal anti-union animus on the part of Welch sufficient to provoke a discharge for union considerations. I find and conclude that on the facts found the Respondent has failed to meet its burden of rebuttal of the General Counsel's *prima facie* case. See generally, *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB No. 150 (1980).

In reaching the above conclusion I reject the Respondent's contention that Willie was only laid off and could have returned to work the following Mon-

day if she had only come back and talked to Welch as he had requested. Even based on Welch's testimony Willie was not assured that she would be reinstated if she came back. On the contrary, Willie's credited testimony establishes that she was fired and she was in fact "paid off." Moreover, it is clear that even if she was initially "laid off" the Respondent subsequently changed her records to show that she was discharged prior to any recall from layoff or offer of reinstatement.

I likewise reject the Respondent's alternative argument that Willie's reference to a union did not confer the protection of the Act under Section 8(a)(1) and (3) upon her. It is quite clear that Section 8(a)(1) of the Act grants employees the right to form, join, or assist a labor organization. It is further clear that Section 8(a)(3) of the Act bars discrimination against employees which either encourages or discourages membership in any labor organization. Based on the credited testimony Welch discriminated against Willie by discharging her because he viewed her remarks as a threat to initiate union organizational efforts. Such action obviously discouraged Willie or any other employee from seeking union membership or otherwise engaging in activity in support of any labor organization, actions protected under the Act. I find that the Respondent violated Section 8(a)(3) and (1) in Willie's discharge. Moreover, I conclude as argued by the General Counsel, Welch's statement to Willie that she had fired herself because of the threatened resort to a union independently violated Section 8(a)(1). See *Modulus Corporation*, 236 NLRB 967 (1978). The assertion of the unlawful reason for the discharge constitutes an unquestionable threat to all other employees that

any inclination toward union activity on their part would result in similar discrimination against them.

Conclusions of Law

1. The Respondent is an employer engaged in commerce and an industry affecting commerce within the meaning of Section 2(2), 2(6), and (7) of the Act.

2. By threatening employees with discharge if they initiate a union organizational campaign or seek union aid the Respondent engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) of the Act.

3. By discriminatorily discharging Lucille Willie on May 22, 1980, the Respondent has engaged in and is engaging in unfair labor practices in violation of Sections 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has violated the Act in the discharge of Lucille Willie I shall recommend an order that it cease and desist from discriminatorily discharging employees and take certain affirmative action necessary to effectuate the policies of the Act. I shall recommend an order that it offer immediate and full reinstatement to Lucille Willie without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings she may have suffered by reason of her unlawful discharge by the Respondent. Backpay with interest thereon is to be computed in the manner prescribed in *F.W. Woolworth Company*, 90 NLRB

289 (1950) and *Florida Steel Corporation*, 231 NLRB 651 (1977).[12]

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[13]

ORDER

Respondent, Scooba Manufacturing Company, Shuqualak, Mississippi, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge if they initiate a union organizational campaign or seek union aid.

(b) Discharging or otherwise discriminating against employees because of their expression of interest in a labor organization or union representation.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

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[12] See, generally, *Iris Plumbing & Heating Co.*, 138 NLRB 716 (1962). The General Counsel's request in a supplemental brief for an assessment of a 9% interest rate is denied. *Shaw Industries, Inc., et al.*, 255 NLRB No. 117 (1981). *Florida Steel, supra*, governs the interest rate.

[13] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Offer Lucille Willie immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings she may have suffered by reason of her unlawful discharge by Respondent in the manner set forth in the section herein entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Shuqualak, Mississippi plants copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[14] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify the Regional Director for Region 26, in writing, within 20 days of the date of this Order, what steps the Respondent has taken to comply herewith.

/s/ Hutton S. Brandon
HUTTON S. BRANDON
Administrative Law Judge

Dated at Washington, D.C.
this 26th day of May 1981.

APPENDIX

[SEAL] [SEAL]

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT threaten employees with discharge if they initiate a union organizational campaign or seek union aid.

WE WILL NOT discharge or otherwise discriminate against employees because of their interest in, or activity on behalf of, a labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under the National Labor Relations Act.

WE WILL offer Lucille Willie immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed and WE WILL make her whole for any loss of earnings she may have suffered by reason of our unlawful discharge of her, with interest.

SCOOBA MANUFACTURING COMPANY
(Employer)

Dated: ———— By: ————————
(Representative) (Title)

This is an Official Notice and
Must Not Be Defaced by Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Mid-Memphis Tower (8th Floor), 1407 Union Avenue, Memphis, TN 38104. Telephone: (901) 521-2687.

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No. 82-1909

In The
Supreme Court of the United States
October Term, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SCOOBA MANUFACTURING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Does the mere interjection of a prounion remark into a personal dispute between an employee and her supervisor automatically render subsequent, and otherwise lawful, disciplinary action a violation of Section 8(a)(1) and (3) of the National Labor Relations Act?

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No. 82-1909

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On Petition for a Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Scooba Manufacturing Company, Inc.,[1] respectfully requests that this Court deny the National Labor Relations Board's Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 20, 1982.

[1]Respondent Scooba Manufacturing Company, Inc., a Mississippi Corporation, has no parent corporation, non-wholly owned subsidiaries, or affiliates.

OPINIONS BELOW

The opinion of the court of appeals, (App. A, *infra*, p. 1a) is reported at 694 F. 2d 82. The decision and order of the National Labor Relations Board is reported at 258 N.L.R.B. 147.

JURISDICTION

The jurisdictional statement in the Petition is correct. Respondent does not question the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U. S. C. § 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection • • •.

Section 8(a) of the National Labor Relations Act, 29 U. S. C. § 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title;
>
> • • •

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

Section 10(c) of the National Labor Relations Act, 29 U. S. C. § 160(c), provides in pertinent part:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . if such individual was suspended or discharged for cause.

STATEMENT OF THE CASE

1. On May 22, 1980, Lucille Willie, an employee of the Respondent, and George Welch, Vice President of the Respondent, entered into a "heated argument" (App. A, *infra*, p. 1a). The dispute began as a discussion concerning the recent discharge of Willie's son (*id.* at 2a). However, the focus of the dispute shifted to Willie's own production and absenteeism problems (*id.*). In the ensuing argument, Willie cursed Welch and was generally insubordinate in her manner and tone of speech (Petition, App. C, p. 14a).[2] Willie then left Welch's office.

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[2]The substance of the argument between Welch and Willie was disputed at the Board's hearing. Welch testified that Willie used curse words several times during their argument (Petition, App. C, p. 14a). This was corroborated by Plant Manager White who was present during the argument (*id.* at 15a). Willie, on the other hand, admitted only to infrequent cursing (*id.* at 13a). Further, both Welch and White testified that Willie was disrespectful and insubordinate during the argument (Record, Vol. 2, pp. 19, 30, 31, 111-12, 126-29). The Fifth Circuit's opinion denying enforcement on other grounds rendered unnecessary a ruling on this point, which has been preserved by Respondent.

Shortly thereafter Willie returned and, feeling "piqued by the preceding discussion," made a remark to Welch concerning a union.[3]

As a result of this dispute, Welch decided to discipline Willie.[4] Welch told Willie to leave the plant and come back Monday with her husband to discuss the situation (App. A, *infra*, p. 2a). Willie testified that she knew she could return to work on Monday if she had followed Welch's instructions (Record, Vol. 2, pp. 73-74, 77-78). This fact notwithstanding, Willie never returned to work.[5]

2. As a result of the foregoing facts, Willie filed an unfair labor practice charge with the National Labor Relations Board. A hearing was held before an Administrative Law Judge ("ALJ") who found that Respondent had discharged Willie in violation of Section 8(a) (1) and (3) of the National Labor Relations Act, 29 U. S. C. § 158 (a) (1) and (3), by "threatening employees with discharge if they initiated a union organizational campaign or

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[3]During the period in question Willie never engaged in any union activity, no labor organization represented the Scooba workforce, and there had never been a union organizing campaign at the plant (App. A, *infra*, p. 3a).

[4]Whether Welch's decision to discipline Willie was made before or after her remark concerning a union was a hotly contested issue at the hearing. The issue was also raised and argued before the court of appeals. The court's disposition of the case, however, rendered a determination of the issue unnecessary. This issue has been preserved by the Respondent.

[5]This issue was raised and argued before the court of appeals, *i. e.*, that Willie's alleged "discharge" constituted only a two day suspension. Indeed, Willie's intentional failure to return to work has resulted in these protracted proceedings. Since the court's decision rendered a determination of the issue unnecessary, Respondent has preserved the issue.

[sought] union aid" and by discriminatorily discharging Willie (Petition, App. C, p. 22a). The National Labor Relations Board affirmed the ALJ's decision (*id.* at 7a).

3. The court of appeals denied enforcement of the Board's order (App. A, *infra*, p. 5a). The court found Willie's remarks to be "the product of a purely personal dispute" (*id.* at 4a). The court recognized that an employee who acts alone is not precluded from the protection of Section 7 of the National Labor Relations Act, 29 U. S. C. § 157 (*id.* at 3a). However, the court held that in order for the individual's actions to be protected, the individual employee "must be engaging in the activity with the object of initiating, inducing or preparing for group action" (*id.*) After searching the record "in vain" for evidence of "talk looking toward group action," the court concluded that the dispute between Willie and Welch had been "purely personal," and therefore, Willie was not entitled to the protection of Section 7 (*id.* at 4a). Further, the court held that the mere use of the word "union" in a conversation between an employee and his superior did not "automatically" invoke Section 7's protections (*id.* at 5a).[6] The Board's petition for rehearing was denied (App. B, *infra*, p. 6a).

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[6]The court's implicit finding that Welch was not motivated by antiunion considerations in disciplining Willie is supported by the evidence (Record, Vol. 1, p. 182, Vol. 2, pp. 56-57, 160-61, 166-68).

REASONS FOR DENYING THE PETITION

The Fifth Circuit's decision holding that Willie's purely personal dispute with Welch did not constitute protected activity under Section 7 is unrelated to the question presented by this Court's review of *City Disposal Systems, Inc. v. NLRB*, 683 F. 2d 1005 (6th Cir. 1982), *cert. granted*, No. 82-960 (March 28, 1983). Further, the decision is not in conflict with decisions of other circuit courts of appeals and the question presented is not a significant issue in the administration of the National Labor Relations Act.

1. The question presented in the *City Disposal Systems* case is whether the National Labor Relations Board properly concluded that an individual employee's reasonable assertion of a right provided for in a collective bargaining agreement is concerted activity protected by Section 7 of the Act. The case involves an individual employee's efforts to assert occupational safety rights embodied in an existing labor agreement. This Court's review of the *City Disposal Systems* case should resolve the controversy surrounding the *"Interboro* doctrine," *i. e.*, that a single employee's attempt to enforce the provisions of a collective bargaining agreement constitutes activity protected by Section 7 "even in the absence of such interest by fellow employees."[7] Clearly, the circuit courts of appeals are deeply divided on this issue.[8]

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[7] *NLRB v. Interboro Contractors, Inc.*, 388 F. 2d 495, 500 (2nd Cir. 1967).

[8] The Second, Seventh and Eighth Circuits have approved the Interboro doctrine: *NLRB v. John Langenbacher Co.*, 398

(Continued on next page)

The instant case involves neither a union nor a collective bargaining agreement. Willie's "purely personal dispute" with Welch concerning deficient production and absenteeism *does not* implicate the occupational safety or contract rights present in the *City Disposal Systems* case.

Petitioner asserts that the Board has extended Section 7 protection to individual employees where their action affects other employees even in the absence of a collective bargaining agreement (Petition, p. 6). Respondent is unaware of *any* court of appeals decision that has accepted this view.[9] Since an individual employee's assertion of rights under a collective bargaining agreement is the cornerstone of the Board's position in *City Disposal Systems* (Petition, p. 7), an issue not present in the instant case, no useful purpose would be served by delaying this Court's consideration of the Petition.

(Continued from previous page)

F. 2d 459, 463 (2nd Cir. 1968), *cert. denied*, 393 U. S. 1049 (1969); *NLRB v. Ben Pekin Corp.*, 452 F. 2d 205, 206 (7th Cir. 1971); *NLRB v. Town & Country LP Gas Service Co.*, 687 F. 2d 187, 191 (7th Cir. 1982); *Pelton Casteel, Inc. v. NLRB*, 627 F. 2d 23, 28 n. 10 (7th Cir. 1980); and *NLRB v. Selwyn Shoe Manufacturing Corp.*, 428 F. 2d 217, 219-221 (8th Cir. 1970). The Third, Fourth, Fifth, Sixth and District of Columbia Circuits have rejected it: *NLRB v. Northern Metal Co.*, 440 F. 2d 881, 884-85 (3d Cir. 1971); *NLRB v. Buddies Supermarkets, Inc.*, 481 F. 2d 714, 719 (5th Cir. 1973); *ARO, Inc. v. NLRB*, 596 F. 2d 713, 716-717 (6th Cir. 1979). *See also Krispy Kreme Doughnut Corp. v. NLRB*, 635 F. 2d 304, 306-310 (4th Cir. 1980); *Kohls v. NLRB*, 629 F. 2d 173, 176-177 (D. C. Cir. 1980), *cert. denied*, 450 U. S. 931 (1981).

[9]Every court of appeals that has confronted the issue has ruled to the contrary. *See Ontario Knife Co. v. NLRB*, 637 F. 2d 840, 845 (2d Cir. 1980); *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F. 2d 304, 309 (4th Cir. 1980); *NLRB v. Bighorn Beverage*, 614 F. 2d 1238, 1242 (9th Cir. 1980).

2. The Fifth Circuit's decision is not in conflict with the decisions of other courts of appeals. The court found that Willie's "purely personal dispute" and "heated argument" with Welch were not concerted activity protected by Section 7.[10]

The Fifth Circuit applied the universally accepted legal standard for determining the presence of "concerted" activity where no applicable collective bargaining agreement exists.[11] It recognized that the actions of an individual employee could be "concerted" within the meaning of the Act, and therefore, protected by Section 7, even in the absence of an existing collective bargaining agreement (App. A, *infra*, p. 3a). In order to be protected, however, the court of appeals determined that the individual employee had to be engaging in activity "with the object of initiating, inducing or preparing for group action" (*id.*).

The law is well settled that personal disputes are not protected by Section 7.[12] The court "searched the record

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[10]Section 7, by its terms, protects the rights of employees "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection. . . ." Thus, a threshold question in any Section 7 case is whether the action sought to be protected was, in fact, "concerted" action. To ignore the concertedness requirement of Section 7 would amount to emasculating the clear meaning of its terms.

[11]See *Ontario Knife Co. v. NLRB*, 637 F. 2d 840, 845 (2d Cir. 1980); *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F. 2d 304, 307 (4th Cir. 1980); *Pelton Casteel, Inc. v. NLRB*, 627 F. 2d 23, 28 (7th Cir. 1980); *ARO, Inc. v. NLRB*, 596 F. 2d 713, 718 (6th Cir. 1979); *Randolph Div., Ethan Allen, Inc. v. NLRB*, 513 F. 2d 706, 708 (1st Cir. 1975); *Mushroom Transportation Co. v. NLRB*, 330 F. 2d 683, 685 (3d Cir. 1964).

[12]See *Mushroom Transportation Co. v. NLRB*, 330 F. 2d 683, 685 (3d Cir. 1964); *Tabernacle Comm. Hos. & Health Care Center*, 233 N.L.R.B. 1425, 1429 (1977); *Ryder Tank Lines, Inc.*, 135 N.L.R.B. 936, 938 *enforcement denied on other grounds*, 310 F. 2d 233 (5th Cir. 1962).

in vain" for evidence of conduct "looking toward group action" (*id.* at 4a). The court's application of these universally accepted legal standards to the uncontroverted facts demonstrates that no conflict exists between the Fifth Circuit's decision and the decisions of other circuit courts of appeals.

3. Similarly, the Fifth Circuit's analysis of the Section 8(a) (3) claim is not in conflict with the decisions of other courts of appeals (Petition, pp. 7-11). Respondent agrees that an employer violates Section 8(a) (3) and (1) of the National Labor Relations Act, 29 U. S. C. § 158 (a) (3) and (1), if he discharges an employee "expressly because the employee said that she would like to have a union at the plant" (Petition, p. I). Respondent concurs that the decisions in *Randolph Div., Ethan Allen, Inc. v. NLRB*, 513 F. 2d 706 (1st Cir. 1975), and *Signal Oil & Gas Co. v. NLRB*, 390 F. 2d 338 (9th Cir. 1968), hold that an employer violates Section 8(a) (3) and (1) of the Act by discharging an employee for prounion remarks. However, the Fifth Circuit found that Willie was discharged as a *result* of a *personal dispute* with Welch (App. A, *infra*, p. 4a). In the *Ethan Allen* and *Signal Oil & Gas* cases, the courts of appeals found that the employers were *motivated* by *antiunion* considerations.[13]

The Fifth Circuit did not, as Petitioner suggests, require an employee's participation in protected concerted

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[13] See *Randolph Div., Ethan Allen, Inc. v. NLRB*, 513 F. 2d 706, 707 (1st Cir. 1975); *Signal Oil & Gas Co. v. NLRB*, 390 F. 2d 338, 341 (9th Cir. 1968). Indeed, if the fact situation presented in *Ethan Allen* or *Signal Oil & Gas* had been present in this case, the court would have ruled differently. *See NLRB v. Charles H. McCauley Assocs., Inc.*, 657 F. 2d 685, 688 (5th Cir. 1981) (employer violated Sections 8(a)(1) and (3) by discharging employee for expressing prounion statements).

activities in order to find a violation of Section 8(a) (3).[14] Section 8(a) (3) of the Act prohibits the discharge of an individual to discourage his participation in a labor organization. A violation of Section 8(a) (3) requires *intent* to discourage union activity on the part of the employer. *Metropolitan Edison Co. v. NLRB*, 103 S. Ct. 1467, 1473 (1983); *American Ship Building Co. v. NLRB*, 380 U. S. 300, 313 (1965). When the court determined that Willie's discipline was *not* motivated by antiunion concerns, but by a *personal dispute*, its Section 8(a) (3) inquiry was at an end.[15] Consequently, the Fifth Circuit's analysis has not created any conflict among the courts of appeals.

4. The question presented, properly framed, does not involve a significant issue concerning the administration of the National Labor Relations Act. The Fifth Circuit's decision turns solely upon the particular facts involved.

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[14]Petitioner contends the court of appeals erred by requiring proof that "collective worker action is contemplated" (Petition, p. 11 n. 9). The court of appeals, however, stated this was a requirement to find a violation of Section 7 rights. The court did not indicate this requirement applied to Section 8 (a) (3) violations.

[15]Having found that Willie's discipline was motivated by her insubordinate actions during a personal dispute with her supervisor, the court of appeals followed the mandate in Section 10(c), 29 U. S. C. § 160 (c), of the Act. Section 10 (c) prohibits the Board from "requir[ing] the reinstatement of any individual as an employee who has been suspended or discharged . . . for cause." In this regard, Justice Burton, in *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U. S. 464, 474 (1953), stated "[M]any cases reaching their final disposition in the Courts of Appeals furnish examples emphasizing the importance of enforcing industrial plant discipline and of maintaining loyalty as well as the rights of concerted activities. The courts have refused to reinstate employees discharged for 'cause' consisting of insubordination, disobedience or disloyalty."

In its decision, the court of appeals accepted Willie's version of her argument with Welch (App. A, *infra*, p. 2a). It could have proceeded to find: (1) that Respondent's purpose in disciplining Willie was to discourage union membership; or (2) that Respondent's purpose was to discipline an employee as a result of a personal dispute and insubordination. After examining the record, the court of appeals found Willie's discipline was caused by "a purely personal dispute" (*id.* at 4a). Willie's statement that it would be "nice" to have a union was made in a heated personal argument with Welch. Willie admitted that she was not attempting to initiate any union organizing efforts (Record, Vol. 2, p. 56).

The responsibility to assess the record to determine whether the Board's findings are supported by substantial evidence is not this Court's.[16] In adhering to the standards set forth in *Universal Camera Corp. v. NLRB*, 340 U. S. 474 (1951), the Fifth Circuit refused to "rubber stamp" the Board's findings because it could not "conscientiously find that the evidence supporting that decision [was] substantial. . . ." 340 U. S. at 488. Petitioner does not claim that the Fifth Circuit misapprehended or grossly misapplied the substantial evidence standard. Consequently, this Court's intervention is not warranted. 340 U. S. at 491.

The Fifth Circuit correctly recognized that the Board was asking it to establish a *per se* rule that every use of the word "union" elevated individual employee action to that protected by Section 7 (App. A, *infra*, p. 5a). Such a *per se* rule would decimate an employer's ability to con-

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[16] *Mobil Oil Corp. v. FPC*, 417 U. S. 283, 309-10 (1974).

trol insubordinate employee conduct in the work place as long as an employee interjected the word "union" into his conversation with his employer. Such a radical interpretation of "concerted activity" has never been embraced by the Board or the courts.[11]

This Court ordinarily does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). The actual difference between the Petitioner's and Respondent's position is the Fifth Circuit's finding that Willie's discipline was the result of a purely personal dispute versus anti-union animus. The court conscientiously applied the substantial evidence rule and found the underlying facts did not support the Board's asserted violations of Section 8 (a) (1) and (3). Factual issues, not legal issues, are in dispute. Accordingly, the Fifth Circuit's decision does not merit review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARMIN J. MOELLER, JR.
(Counsel of Record)

W. THOMAS SILER, JR.

June 27, 1983

[11]Petitioner contends that the court of appeals mischaracterized the Board's position (Petition, p. 8 n. 5). Yet, the practical effect of the Board's decision would be to allow an individual employee with a personal gripe to confront his supervisors in any disruptive or insubordinate manner he chose and, as long as he expressed prounion sentiments during the confrontation, his actions would be protected.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 81-4411
Summary Calendar

SCOOBA MANUFACTURING COMPANY,
PETITIONER CROSS-RESPONDENT

VS.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT CROSS-PETITIONER

Dec. 20, 1982

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Scooba Manufacturing Company produces work gloves at its plant in Shuqualak, Mississippi. Scooba employed Lucille Willie as a sewer at that plant. George Welch was the vice-president of operations until 1980. After a heated argument between Willie and Welch, Willie was discharged. The General Counsel of the National Labor Relations Board alleged that Scooba had violated sections 8(a) (1) and (3) of the National Labor Relations Act by

discharging Willie. An administrative law judge found that Scooba had violated the act, and the Board adopted the ALJ's recommended order. Scooba filed a petition for review before this court, and the Board cross-petitioned for enforcement of its order. Because we conclude that Willie was not engaged in activity protected by the NLRA, we set aside the Board's order, grant the petition for review, and deny the petition for enforcement.

Willie was working at her station one day when she learned that Scooba had fired a fellow employee who also happened to be her son. The trauma of the moment brought on a headache, and she left her station to get some aspirin from Welch's office. A vigorous argument ensued between Willie and Welch regarding her son's discharge. The escalating argument gradually turned to Willie's own work performance and absenteeism. To substantiate his arguments, Welch ordered a plant supervisor to retrieve Willie's production records. When the supervisor returned, Willie started to leave the room. As she reached the doorway, she turned to Welch and angrily proclaimed: "It would be nice if it was a union here. A whole lot of things going on wouldn't be going on." With that, she stormed out.

Desiring to have the last word, Welch summoned Willie. When she returned, he vociferated: "You just fired your damn self. Don't nobody threaten me with no damn union because this is my plant, and I run it any damn way I want." He sent the supervisor to obtain Willie's time records. Willie was given her final paycheck and sent home. Before leaving, Welch told Willie to return the following Monday with her husband to talk about the situation. Willie never returned.

Willie testified that she never engaged in any union activity. No labor organization represented the Scooba workforce. There had never been a union-organizing campaign at the Scooba plant.

Section 7 of the NLRA, 29 U. S. C. § 157, guarantees employees the right to form, join and assist labor organizations, "and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection . . . ." Scooba has been accused of improperly interfering with those rights.

The mere fact that an employee acts alone does not preclude treatment of his action as a protected activity under the Act. *Richardson Paint v. NLRB,* 574 F. 2d 1195, 1207 (5th Cir. 1978). That individual employee, however, must be engaging in the activity with the object of initiating, inducing or preparing for group action. It is essential that the activity have some relation to group action in the interest of the employees. *NLRB v. McCauley,* 657 F. 2d 685, 688 (5th Cir. 1981); *Anchortank, Inc. v. NLRB,* 618 F. 2d 1153, 1161 (5th Cir. 1980); *NLRB v. Buddies Supermarkets, Inc.,* 481 F. 2d 714, 717-19 (5th Cir. 1973); *Southwest Latex Corp. v. NLRB,* 426 F. 2d 50, 56 n.3 (5th Cir. 1970). Absent substantial evidence that the discharged employee was seeking to instigate some form of group action, dialogue with management is not a protected activity. *NLRB v. Datapoint Corp.,* 642 F. 2d 123, 128 (5th Cir. 1981); *Buddies Supermarkets, Inc.,* 481 F. 2d at 718; *Mushroom Transportation Co. v. NLRB,* 330 F. 2d 683, 685 (3d Cir. 1964). *See McCauley,* 657 F. 2d at 688 ("Individual griping and complaining are not protected concerted activity.")

We have searched the record in vain for evidence that Willie's exchange with Welch was "talk looking toward group action." *Buddies Supermarkets* at 718. There is no indication that Willie was acting as a spokeswoman for her fellow employees. The record shows no prior effort at organization by any other employee or group, nor does it show any prior talk about collective bargaining by any employees. Willie's remark was the product of a purely personal dispute with Welch.

The Board argues that we are bound by *NLRB v. McCauley*, 657 F. 2d 685 (5th Cir. 1981). That case is easily distinguishable from this one. In *McCauley*, an employee named Richard Beck talked with at least two of his fellow employees concerning their working conditions and the possibility of unionization. Beck then met with several management officials. He made numerous complaints, and continually emphasized that he was acting on behalf of all employees. One of the supervisors forbade him from discussing the issues with other workers. Beck answered that the company "left him no alternative except to contact the local union representative to come in and try to bargain." *Id.* at 687. Beck was discharged on the spot. We held that Beck's actions "were clearly a predicate for possible group activity." *Id.*

Unlike the employee in *McCauley*, Willie never discussed the possibility of unionization with other Scooba employees. She did not purport to act on behalf of other workers. She did not threaten to contact a union, but merely stated that she thought one would be "nice." It is obvious that *McCauley* involved an entirely different situation from that involved in this case.

In effect, the Board urges that if any employee uses the word "union" in a conversation with his superiors he or she is automatically engaged in protected concerted activity. We do not agree. Purely personal disputes are not within the protection of the Act. The General Counsel must show that some sort of collective worker action is contemplated. That was not done here. We therefore set aside its order. Scooba's petition for review is GRANTED. The Board's cross-petition for enforcement is DENIED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4411

SCOOBA MANUFACTURING COMPANY,
PETITIONER CROSS-RESPONDENT,

versus

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT CROSS-PETITIONER

Petition for Review and Cross-Application for
Enforcement of an Order of the
National Labor Relations Board

ON PETITION FOR REHEARING
(January 26, 1983)

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Charles Clark
Chief Judge

Clerk's Note:

See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate.

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Supplemental Brief

NO. 82-1909

In The

Supreme Court of the United States

October Term, 1983

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SCOOBA MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM OF RESPONDENT SUGGESTING THAT THE CAUSE IS MOOT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM OF RESPONDENT SUGGESTING THAT THE CAUSE IS MOOT

A. INTRODUCTION

The respondent[1] in the above entitled case files this memorandum to advise the Court of certain facts which,

[1]Respondent Scooba Manufacturing Company, Inc., a Mississippi corporation, has no parent corporation, non-wholly owned subsidiaries, or affiliates.

in respondent's view, render a major portion of this cause moot.

The questions the petitioner seeks to raise on this appeal are twofold:

(1) Whether Sections 7 and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158(a)(1), protect individual employee conduct in the absence of an extant collective bargaining agreement merely because the individual employee's conduct is deemed to affect other employees (Petition, pp. 6-7); and

(2) Whether the Fifth Circuit's determination that the facts of the instant case did not warrant a violation of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), was erroneous (Petition, pp. 7-8).

B. THE SECTION 7 ISSUE

With regard to the Section 7 issue, the Petitioner states its position as follows:

> What [the Fifth Circuit's decision] ignore[s] is that the Board, relying on its expertise in these matters, has concluded that certain conduct undertaken by a single individual inherently affects all other employees and thus is within the coverage of Section 7. Accordingly, the Board argued, *inter alia*, in its petition in *City Disposal Systems, Inc.* (82-960 Pet. 11), that an employee who successfully asserts a right in a collective bargaining agreement necessarily benefits all members of the unit subject to that agreement. Hence, regardless of the specific employee's motive or personal interest in the outcome, the action is still concerted activity . . . . Similarly, any prounion statement made in the course of an employee-management discussion of alleged arbitrary employment practices sufficiently anticipates possible future union activity

> to be protected by Section 7. If the Board's position in *City Disposal Systems, Inc.* is sustained by this Court, the Fifth Circuit's requirement of specific evidence of "concertedness" in the present case would necessarily be undermined. . . .

Petition, pp. 6-7 (footnotes and citations omitted).

On January 6, 1984, the National Labor Relations Board rendered a decision in *Meyer Industries, Inc.*, 268 N.L.R.B. No. 73, 115 LRRM 1025 (1984), which overrules a long line of Board cases and completely reverses its position in the instant case. In *Meyers* the Board specifically rejected the "*per se* standard of concerted activity, by which the Board determines what *ought to be* of group concern and then artificially presumes that it *is* of group concern. . . ." 268 N.L.R.B. No. 73, Slip Op. at 10, 115 LRRM at 1028 (emphasis in original). Accordingly, the Board now takes the position that, absent an existing collective bargaining agreement, the General Counsel must prove an individual employee acted "with or on the authority of other employees" in order to be engaged in protected activity. 262 N.L.R.B. No. 73, Slip Op. at 12, 115 LRRM at 1029.

The Board, in its *Meyers* decision, specifically distinguished Section 7's application in cases where no collective bargaining agreement existed and those cases involving an extant collective bargaining agreement. 262 N.L.R.B. No. 73, Slip Op. at 11, 115 LRRM at 1028. Consequently, the Board embraced the respondent's position in the instant case and recognized that the so-called "*Interboro* doctrine," currently under consideration by this Court in *City Disposal Systems, Inc. v. NLRB*, 683 F.2d 1005 (6th Cir. 1982), *cert. granted*, No. 82-960 (March 28,

1983), is fundamentally and conceptually distinguishable from the issue present here.

The *Meyers* decision completely reverses the petitioner's position on the Section 7 issue. As a result, the requisite adversity required to invoke the Court's jurisdiction is lacking thus rendering the issue non-justiciable. *See Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 691 (1979); *Environmental Protection Agency v. Brown*, 431 U.S. 99, 103-04 (1977). Since the intervening *Meyers* decision renders the Section 7 issue moot, and, concomitantly, makes any decision regarding this issue purely advisory in nature, the respondent respectfully submits that the Court should not pass upon this issue.

C. THE SECTION 8(a)(3) ISSUE

The Section 8(a)(3) issue presented in the instant case is totally unworthy of this Court's review. Far from presenting a significant legal controversy warranting this Court's attention, the instant case presents only a disputed factual setting over which the parties are at issue (Brief of Respondent, pp. 9-10). Indeed, the Fifth Circuit has consistently applied the legal principles espoused in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980),[2] and, despite petitioner's assertions to the contrary, did not purport to alter those legal concepts in the instant case. *Compare NLRB v. Associated Milk Prod.*,

[2]This Court recently approved the Board's *Wright Line* analysis in *NLRB v. Transportation Management Corp.*, — U.S. —, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983).

Inc., 711 F.2d 627 (5th Cir. 1983) *with NLRB v. Charles H. McCauley Assoc., Inc.*, 657 F.2d 685 (5th Cir. 1981).

Accordingly, the instant case does not merit the Court's review pursuant to its long standing refusal to embroil itself in factual disputes where no significant legal issue is involved. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

D. CONCLUSION

For these reasons, respondent suggests that the Section 7 issue sought to be raised is moot and should be remanded with a direction to dismiss. Furthermore, the Section 8(a)(3) issue does not warrant this Court's review and the Petition, insofar as it relates to that issue, should be denied.

Respectfully submitted,

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February 6, 1984

No. 82-1909

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SCOOBA MANUFACTURING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In our petition we argued that the holding of the court of appeals that an employee's prounion statement was not concerted activity within the meaning of Section 7 of the National Labor Relations Act, 29 U.S.C. 157, raised an issue akin to that in *NLRB* v. *City Disposal Systems, Inc.*, cert. granted, No. 82-960 (Mar. 28, 1983), which might warrant holding the petition pending disposition of that case. Alternatively, we submitted that the decision below that an employer can discharge an employee simply for expressing a prounion sentiment without violating Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), conflicted with a prior First Circuit decision and therefore warranted review by this Court. Respondent has made several contentions that warrant a brief reply.

1. With regard to the relationship between this case and *City Disposal Systems, Inc.*, respondent merely asserts (Br. in Opp. 6-7) that the cases are different because, unlike the employee in *City Disposal*, respondent's employee, Willie, was not asserting a right expressly provided for in a collective bargaining agreement. We do not deny that there is an obvious factual difference between the cases, but the legal issue, viz., what conduct by a single employee is concerted activity within the meaning of Section 7, is the same and there is a realistic likelihood that this Court's decision on that issue in *City Disposal* will affect the validity of the decision below. Accordingly, holding this petition may be warranted.

2. Respondent does not dispute (Br. in Opp. 9) the Board's contention that an employer violates Section 8(a)(3) and (1) of the Act if the record shows that the employer discharged an employee for making prounion remarks. See *Randolph Division, Ethan Allen, Inc.* v. *NLRB*, 513 F.2d 706 (1st Cir. 1975). To avoid the application of this rule to its case, however, respondent mischaracterizes the decision below by stating that the court made an "implicit finding that Welch was not motivated by antiunion considerations in disciplining Willie" (Br. in Opp. 5 n.6) and that the court, on the contrary, "found that Willie's discipline was motivated by her insubordinate actions during a personal dispute with her supervisor" (Br. in Opp. 10 n.15).[1] *Respondent made those* contentions before the

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[1]Respondent's statement (Br. in Opp. 9) that "the Fifth Circuit found that Willie was discharged as a *result* of a *personal dispute* with Welch" is misleading. Rather, what the court found was that Willie's prounion "remark was the product of a purely personal dispute with Welch" (Pet. App. 4a). Thus, accepting the Board's finding that Welch expressly discharged Willie because of her prounion remark, the court nonetheless set aside the Board's conclusion that the discharge violated Section 8(a)(3) and (1) of the Act because, in the court's view, Willie's remark did not constitute concerted, protected activity because it was made in the context of a personal dispute.

Board, but they were rejected. Nothing in the decision below supports respondent's suggestion that the court of appeals, acting under a substantial evidence standard of review, reversed *sub silentio* the Board's credibility resolutions and findings of fact.[2] Indeed, if the court had accepted respondent's version of the facts and had determined that respondent's discharge of Willie was not motivated by her prounion remark, there would have been no occasion to discuss whether Willie's remark constituted concerted activity, protected under the Act.

Nor can it be seriously argued that the Board's finding of antiunion animus is not supported by the record. The Court need look no further than the statement of respondent's vice president, George Welch, in response to Willie's prounion statement: "You just fired your damn self. Don't nobody threaten me with no damn union because this is my plant, and I run it any damn way I want" (Pet. App. 2a, 12a, 18a-19a). Accordingly, under the interpretation of Section 8(a)(3) and (1) embraced by respondent itself, there is no doubt but that it committed an unfair labor practice and, accordingly, the court of appeals plainly erred in declining to enforce the Board's order to that effect.

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[2]Respondent contended before the Board (Pet. App. 14a-16a) that the decision to discipline Willie was made before she even mentioned a union, on the basis of her allegedly insubordinate behavior, and that Willie was merely suspended, not discharged. The administrative law judge, discrediting much of respondent's evidence, rejected those contentions (Pet. App. 17a-21a); the Board affirmed (Pet. App. 7a-8a); and the court of appeals left the Board's findings of fact undisturbed (Pet. App. 2a-3a).

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted or, alternatively, it should be held pending the Court's disposition of *NLRB* v. *City Disposal Systems, Inc.*, No. 82-960, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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JULY 1983

DOJ-1983-07

NO. 82-1909

In The

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October Term, 1983

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Petitioner,

vs.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM OF RESPONDENT SUGGESTING THAT THE CAUSE IS MOOT

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MEMORANDUM OF RESPONDENT SUGGESTING THAT THE CAUSE IS MOOT

A. INTRODUCTION

The respondent[1] in the above entitled case files this memorandum to advise the Court of certain facts which,

[1]Respondent Scooba Manufacturing Company, Inc., a Mississippi corporation, has no parent corporation, non-wholly owned subsidiaries, or affiliates.

in respondent's view, render a major portion of this cause moot.

The questions the petitioner seeks to raise on this appeal are twofold:

(1) Whether Sections 7 and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158(a)(1), protect individual employee conduct in the absence of an extant collective bargaining agreement merely because the individual employee's conduct is deemed to affect other employees (Petition, pp. 6-7); and

(2) Whether the Fifth Circuit's determination that the facts of the instant case did not warrant a violation of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), was erroneous (Petition, pp. 7-8).

B. THE SECTION 7 ISSUE

With regard to the Section 7 issue, the Petitioner states its position as follows:

> What [the Fifth Circuit's decision] ignore[s] is that the Board, relying on its expertise in these matters, has concluded that certain conduct undertaken by a single individual inherently affects all other employees and thus is within the coverage of Section 7. Accordingly, the Board argued, *inter alia*, in its petition in *City Disposal Systems, Inc.* (82-960 Pet. 11), that an employee who successfully asserts a right in a collective bargaining agreement necessarily benefits all members of the unit subject to that agreement. Hence, regardless of the specific employee's motive or personal interest in the outcome, the action is still concerted activity . . . . Similarly, any prounion statement made in the course of an employee-management discussion of alleged arbitrary employment practices sufficiently anticipates possible future union activity

> to be protected by Section 7. If the Board's position in *City Disposal Systems, Inc.* is sustained by this Court, the Fifth Circuit's requirement of specific evidence of "concertedness" in the present case would necessarily be undermined. . . .

Petition, pp. 6-7 (footnotes and citations omitted).

On January 6, 1984, the National Labor Relations Board rendered a decision in *Meyer Industries, Inc.*, 268 N.L.R.B. No. 73, 115 LRRM 1025 (1984), which overrules a long line of Board cases and completely reverses its position in the instant case. In *Meyers* the Board specifically rejected the "*per se* standard of concerted activity, by which the Board determines what *ought to be* of group concern and then artificially presumes that it *is* of group concern. . . ." 268 N.L.R.B. No. 73, Slip Op. at 10, 115 LRRM at 1028 (emphasis in original). Accordingly, the Board now takes the position that, absent an existing collective bargaining agreement, the General Counsel must prove an individual employee acted "with or on the authority of other employees" in order to be engaged in protected activity. 262 N.L.R.B. No. 73, Slip Op. at 12, 115 LRRM at 1029.

The Board, in its *Meyers* decision, specifically distinguished Section 7's application in cases where no collective bargaining agreement existed and those cases involving an extant collective bargaining agreement. 262 N.L.R.B. No. 73, Slip Op. at 11, 115 LRRM at 1028. Consequently, the Board embraced the respondent's position in the instant case and recognized that the so-called "*Interboro* doctrine," currently under consideration by this Court in *City Disposal Systems, Inc. v. NLRB*, 683 F.2d 1005 (6th Cir. 1982), *cert. granted*, No. 82-960 (March 28,

1983), is fundamentally and conceptually distinguishable from the issue present here.

The *Meyers* decision completely reverses the petitioner's position on the Section 7 issue. As a result, the requisite adversity required to invoke the Court's jurisdiction is lacking thus rendering the issue non-justiciable. *See Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 691 (1979); *Environmental Protection Agency v. Brown*, 431 U.S. 99, 103-04 (1977). Since the intervening *Meyers* decision renders the Section 7 issue moot, and, concomitantly, makes any decision regarding this issue purely advisory in nature, the respondent respectfully submits that the Court should not pass upon this issue.

C. THE SECTION 8(a)(3) ISSUE

The Section 8(a)(3) issue presented in the instant case is totally unworthy of this Court's review. Far from presenting a significant legal controversy warranting this Court's attention, the instant case presents only a disputed factual setting over which the parties are at issue (Brief of Respondent, pp. 9-10). Indeed, the Fifth Circuit has consistently applied the legal principles espoused in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980),[1] and, despite petitioner's assertions to the contrary, did not purport to alter those legal concepts in the instant case. *Compare NLRB v. Associated Milk Prod.*,

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Accordingly, the instant case does not merit the Court's review pursuant to its long standing refusal to embroil itself in factual disputes where no significant legal issue is involved. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

D. CONCLUSION

For these reasons, respondent suggests that the Section 7 issue sought to be raised is moot and should be remanded with a direction to dismiss. Furthermore, the Section 8(a)(3) issue does not warrant this Court's review and the Petition, insofar as it relates to that issue, should be denied.

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